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June 9, 1997

BY HAND DELIVERY

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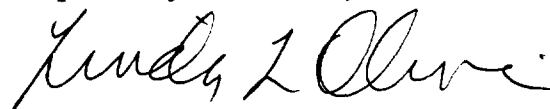
**Re: Southwestern Bell, Pacific Bell, and Nevada Bell Joint
Petition for Partial Stay in CC Dockets 96-262 and 94-1**

Dear Mr. Caton:

Pursuant to the FCC's Public Notice DA 97-1187, released June 4, 1997, enclosed for filing in the above-referenced docket are the original and five copies of the "Opposition of WorldCom, Inc. to Joint Petition For A Partial Stay And For Imposition Of An Accounting Mechanism Pending Judicial Review" We have also hand delivered two copies to James Schlichting, Chief, Competitive Pricing Division, Common Carrier Bureau.

Please return a date-stamped copy of the enclosed (copy provided)

Respectfully submitted,



Linda L. Oliver
Counsel for WorldCom, Inc.

Enclosures

cc: Robert M. Lynch
Nancy C. Woolf
ITS, Inc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN - 9 1997

Federal Communications Commission
Office of Secretary

In the Matter of)

Access Charge Reform)

CC Docket No. 96-262

Price Cap Performance Review
for Local Exchange Carriers)

CC Docket No. 94-1

Southwestern Bell, Pacific Bell, and
Nevada Bell Joint Petition for Partial Stay)

OPPOSITION OF WORLDCOM, INC.

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Dated: June 9, 1997

SUMMARY

The Commission should deny SBC's petition for stay because SBC does not meet any of the four criteria for granting a stay.

First, SBC is not likely to prevail on the merits. On the contrary, incumbent LECs cannot offer or charge for exchange access over unbundled network elements that, by definition, constitute facilities that another carrier has purchased the right to use to offer telecommunications services. Moreover, the statute clearly requires that rates for unbundled network elements be based on the cost of providing those elements, 47 U.S.C. § 252(d)(1), which forbids the assessment of access charges upon purchasers of unbundled network elements.

Second, SBC will not suffer irreparable injury if a stay is denied because mere financial losses do not constitute irreparable injury, and because local competition is in its infancy and no significant incumbent LEC revenue is at risk.

Third, a stay would cause severe harm to long distance and competitive local carriers and to their customers. Local competition will be stopped dead in its tracks if competitive entrants are not able to provide (and be compensated for) the same range of telecommunications services as the incumbent LECs, using their own facilities or unbundled network elements.

Fourth, a stay would harm the public interest. The rule against imposing access charges on purchasers of unbundled network elements is central not only to the development of local competition, but also to the Commission's "market-based" access reform strategy.

Finally, if this stay were granted, the Commission would have to proceed immediately with prescriptive measures to reduce access charges, should not take any action to further expand the incumbent LECs' pricing flexibility, and should not grant any Section 271 application for BOC interLATA entry.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Access Charge Reform)	CC Docket No. 96-262
)	
Price Cap Performance Review)	CC Docket No. 94-1
for Local Exchange Carriers)	
)	
Southwestern Bell, Pacific Bell, and)	
Nevada Bell Joint Petition for Partial Stay)	
)	

OPPOSITION OF WORLDCOM, INC.

WorldCom, Inc., by its attorneys, submits its opposition to the Joint Petition of Southwestern Bell, Pacific Bell, and Nevada Bell (collectively "SBC") for a partial stay of the Access Reform Order and the Price Cap Order. 1/ The Commission should deny the stay petition because SBC has failed to satisfy the four prerequisites for grant of a stay. 2/

I. SBC IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL.

The stay should be denied because SBC is not likely to succeed on the merits of its appeal.

1/ Access Charge Reform, CC Docket No. 96-262, First Report and Order, FCC 97-158 (released May 16, 1997) ("Access Reform Order"); Price Cap Performance Review for Local Exchange Carriers, Fourth Report and Order, FCC 97-159 (released May 21, 1997) ("Price Cap Order"). This opposition is filed pursuant to the Public Notice, DA 97-1187 (released June 4, 1997).

2/ Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

SBC is incorrect, first, in contending that it has a right to collect access charges from purchasers of unbundled network elements. The ruling in the Access Reform Order that interstate access charges do not apply to unbundled network elements is only a restatement of the definition of unbundled network elements embodied in the statute and in the FCC's regulations implementing Section 251 of the Act, adopted last August. 3/ The plain language of the statute permits purchasers of network elements to use those elements to provide "any telecommunications service." 4/ The term "local exchange carrier" in the Act also is defined broadly to include a provider of "telephone exchange service or exchange access." 5/ Thus, purchasers of unbundled elements can use those elements to offer both local exchange and exchange access service. *By statutory definition*, the incumbent local exchange carrier ("LEC") cannot offer or charge for exchange access provided over unbundled elements that have been purchased by another carrier.

It should be obvious that the interexchange carrier cannot be charged double access charges (both by the requesting carrier buying unbundled elements

3/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (hereafter "1996 Act" or "Act"), 47 U.S.C. § 251; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15711-12, ¶ 421 (1996) ("Local Competition Order"), pets. for review pending sub nom. Iowa Utilities Board v. FCC, No. 96-3321 et. al. (8th Cir., petition filed September 6, 1996).

4/ 47 U.S.C. § 251(c)(3).

5/ 47 U.S.C. § 153(26).

and then again by the incumbent LEC). It also should be obvious that if the incumbent LEC charges those access charges instead to the requesting carrier purchasing unbundled elements, then the requesting carrier is not in fact able to provide interexchange access over those elements because it would be forced to take any such access charge revenue and turn it promptly over to the incumbent LEC. Thus, any scheme that would permit an incumbent LEC to continue to levy access charges on unbundled elements would, as a practical matter, deprive the purchaser of unbundled elements of the ability to provide exchange access over those elements -- contrary to the definition of network elements in the Act.

SBC also is incorrect in its assertion that the FCC's ruling in the Access Reform Order on the applicability of interstate access charges to unbundled elements involves pricing and is therefore subject to the Eighth Circuit's order staying certain of the FCC's implementing regulations. ^{6/} The ruling at issue involves not the actual *prices* for unbundled elements, but rather the *definition* of what an unbundled network element is. The Eighth Circuit stayed the FCC's rules that described how prices for unbundled elements should be established, on the grounds that the state regulatory commissions, and not the FCC, arguably had exclusive jurisdiction to establish those prices. The Court did not stay the effectiveness of the statutory unbundling provision, the definition of network elements, or the portions of the FCC's Local Competition Order and rules that gave

^{6/} See n. 3, above.

requesting carriers the right to provide exchange access services over unbundled network elements. 7/

SBC is likely to lose on the merits of its appeal for a second reason. Section 252(d)(1) of the Act explicitly requires that the rates for unbundled network elements are to be “based on the cost . . . of providing the . . . element” -- *i.e.*, free of access surcharges or other subsidies. Whatever pricing methodology a state commission might employ during the pendency of the Eighth Circuit stay, the statute does not permit an incumbent LEC to impose access charges on top of the cost-based rates it charges for unbundled elements, nor does it permit incumbent LECs to collect subsidies embodied in access charges on top of those rates. Thus, even though (as SBC argues) the Commission has not finished identifying universal service subsidies and removing such subsidies from access charges, 8/ the

7/ Specifically, Sections 51.307(c) and 51.309(b) were not stayed. See also Local Competition Order, 11 FCC Rcd at 15679-83, ¶¶ 356-65 (concluding that carriers purchasing unbundled network elements are entitled to use those elements to provide exchange access service).

Moreover, the Eighth Circuit stay derives from the court’s uncertainty about the extent of the Commission’s pricing authority under Sections 251 and 252 of the Act, particularly as applied to offerings that are arguably intrastate. Even assuming that the stay were relevant here, it could not affect the FCC’s authority under Sections 201-205 of the Act to specify what services are and are not subject to the application of Part 69 interstate access charges.

Finally, given the differences between unbundled network elements and interstate access services, there is no merit to SBC’s argument that the application of different rates would be unreasonably discriminatory. SBC Petition at 11-12.

8/ SBC Petition at 8-10.

Commission did not act arbitrarily in deciding not to allow the imposition of access charges on unbundled network element rates, because those rates can never include subsidies.

In sum, because SBC improperly relies on the scope of the Eighth Circuit's stay, and because it is incorrect in its interpretation of the Act on the applicability of access charges to unbundled network elements, SBC is unlikely to succeed on the merits with respect to the access charge applicability ruling.

SBC also is unlikely to succeed on the merits of its challenges to the FCC's price cap rulings. 9/ The FCC's decisions on ratemaking matters are entitled to the great deference. The FCC had substantial record evidence to support each of its conclusions. SBC is unlikely to succeed on the merits of its appeal in this regard as well.

II. SBC WILL NOT SUFFER IRREPARABLE INJURY IF A STAY IS NOT GRANTED.

SBC's claims of injury if a stay is not granted are speculative and contrary to reality. First, as SBC acknowledges, mere financial loss is not enough to justify the extraordinary measure of stay relief. 10/ Moreover, any loss must be

9/ While not the primary focus of this pleading, we also address SBC's requests for a stay of the price cap index reduction for completion of equal access amortization, and for a stay of the application of the 6.5% X-factor from July 1996 onward.

10/ Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) ("economic loss, does not, in and of itself, constitute irreparable harm.") See SBC Petition at 23.

"both certain and great." 11/ SBC has not demonstrated that either is the case.

Second, SBC is unlikely in any event to lose significant access charge revenue due to purchase of unbundled elements by competing local exchange providers.

WorldCom's subsidiary MFS Communications, for example, has no customers in Texas that are served via unbundled loops or any other unbundled elements today, even though it signed its interconnection agreement with SBC almost a year ago, on July 16, 1996. 12/ In California, the other large SBC state, MFS has fewer than 4,000 access lines served via unbundled loops -- and none via unbundled switching -- even though it executed an agreement with Pacific Bell in January 26, 1996. 13 This represents less than 0.03 percent of the total number of access lines for Pacific Bell in California. 14/

The truth is that implementation of local competition through unbundled elements is in its infancy, and the birth of unbundled local switching still is anxiously awaited. The many operational problems that have arisen in SBC

11/ Wisconsin Gas at 674.

12/ That agreement was formally approved by the Texas commission on December 19, 1996.

13/ MFS signed an agreement with Pacific Bell on November 17, 1995. The California Commission approved it on January 17, 1996, but required several changes, which were executed on January 26, 1996.

14/ As of December 31, 1994, Pacific Bell had 14,680,359 presubscribed lines in California. FCC, Statistics of Communications Common Carriers, 1994-'95 Edition at 17 (Table 2.3).

territory (and in other states) have caused the rollout of local competition to be even further delayed. Moreover, every new entrant has to win local customers customer-by-customer, and has to persuade each customer to leave the security of the monopoly provider.

In short, it is highly unlikely that SBC will lose local customers via unbundled elements with any speed, and thus any loss in access revenues is likely to be gradual, incremental, and minimal. In contrast, as discussed in the next two sections, the harm to others and the public interest from a stay would be enormous.

SBC also is unlikely to suffer irreparable injury from implementation of the FCC's price cap decisions. First, SBC has been earning above the authorized rate of return for some time. Second, any access revenue lost is of the type of financial loss that is not cognizable for purposes of granting stay relief. ^{15/} Third, SBC seeks selectively to stay only those portions of the Access Reform Order and Price Cap Order that run against its interests. In many other respects SBC won many contested issues in ways that benefit SBC and hurt its competitors, yet it does not seek to stay those portions of the Order from which it gains financial benefit. Any showing of irreparable revenue loss must be counter-balanced by these revenue gains. For example, the FCC declined to take prescriptive action to reduce access charge rate levels, even though it acknowledged that access charges are well above

^{15/} Wisconsin Gas, 758 F.2d at 674-676.

economic cost. ^{16/} As we note below, the Commission would have to implement such prescriptive measures if it were to stay other aspects of its orders. Thus it is by no means clear that SBC would experience greater revenue loss without a stay than with one in place.

III. A STAY WOULD HARM INTEREXCHANGE CARRIERS, THEIR CUSTOMERS, AND POTENTIAL LOCAL COMPETITORS.

Issuance of a stay in this case would cause irreparable harm to potential providers of competitive local exchange service and would deprive interexchange carriers and their customers of the benefits of access charge reductions.

The ability of entrants to the local market to provide the full range of services that their competitors do (the incumbent LECs) is essential to their success. Even SBC could not deny the importance to Congress of guaranteeing potential entrants the ability to employ the incumbent local exchange carrier network -- at cost-based rates -- as a means to provide competitive local exchange service to a wide range of customers while entrants build out competitive local exchange networks as economically justified. Certainly WorldCom is committed to building local exchange facilities of its own as much as possible. But to do so, it must rely on use of unbundled network elements.

^{16/} Access Reform Order, ¶ 28.

Local exchange entrants cannot fully compete against the incumbent LECs, however, unless they can provide (and be compensated for) the same range of telecommunications services as the incumbent LECs can, using either their own facilities or unbundled network elements purchased from the incumbents, including access. This cannot occur if the incumbent LECs are permitted to collect access charges from carriers that order their unbundled network elements. SBC's Petition is nothing more than another attempt to avoid the very competition that the 1996 Act promises. The Petition is part and parcel of a strategy to stonewall against compliance with the local competition provisions of the Act, while seeking premature regulatory relief (in the Access Reform docket and in applications for interLATA entry, for example) that can only be justified when local competition actually develops. Thus, grant of a stay would harm consumers by delaying indefinitely the ability of entrants to bring them a choice of local service provider.

Grant of a stay would also harm consumers by depriving them of the benefits of access charge reductions that would result from the price cap index ("PCI") changes and related rate reduction measures ordered by the Commission. These reductions would have undoubtedly been passed on to consumers in lower long distance rates.

IV. A STAY WOULD HARM THE PUBLIC INTEREST.

The public interest would certainly be harmed by grant of a stay. As discussed in the previous section, a stay would bring local competition development

almost to a halt, and would deprive consumers of reductions in long distance rates that would flow from reductions in access charges.

The rule against imposing access charges on purchasers of unbundled network elements is central not only to the development of local competition, but also to the Commission's "market-based" strategy to reform the incumbent LECs' overpriced access charges. ^{17/} If the Commission or a Court were to stay the ruling on access charge applicability, the entire premise of the FCC's decision not to impose prescriptive measures to reduce access charges would be gone. The FCC would need to stay the effectiveness of the entire Access Charge Reform Order and immediately reconsider its decision to put off, in favor of market forces, the need for prescriptive reductions in above-cost access charges. It also would have to put off indefinitely any consideration of further pricing flexibility for incumbent LECs facing local competition, because the predicate for such flexibility -- local competition -- would be gone.

Most important, the FCC could not grant any Section 271 application for interLATA entry if the Bell Operating Companies ("BOCs") are permitted to assess access charges on unbundled network element purchasers. Without the ability to employ unbundled network elements to become a full-fledged local telephone company, potential local competitors of the BOCs will have only one realistic avenue for such activity: full duplication of the incumbent LEC local

^{17/} Access Reform Order, ¶¶ 262-74.

network facilities. Since this is far from being economically justifiable today for any but a handful of customers, the predicate for BOC entry -- competition in the local market and the ability of its competitors to become local telephone companies themselves -- will be absent. Certainly it would be impossible for the FCC to conclude that the public interest would be served by BOC entry under such a scenario. Thus, grant of a stay would not only put local competition on hold, it would of necessity also have to put BOC interLATA entry plans on hold.

CONCLUSION

The Commission should not countenance SBC's audacity in challenging virtually the only rulings in the massive Access Reform Order and Price Cap Order on which it did not prevail. SBC's real goal in seeking a stay is to put yet another roadblock in the path of local competition while keeping for itself for as long as possible above-cost access charges.

Because SBC has failed to satisfy any of the four requirements for grant of a stay, the FCC should deny the petition. If a reviewing Court were to grant a stay, the FCC should immediately put in place prescriptive access reform measures, halt all consideration of pricing flexibility, and refuse to grant any Section 271 applications.

Respectfully submitted,

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Dated: June 9, 1997

CERTIFICATE OF SERVICE

I, Barbara E. Clocker, hereby certify that on this 9th day of June, 1997, copies of the foregoing "Opposition of WorldCom, Inc. to Joint Petition For A Partial Stay And For Imposition Of An Accounting Mechanism Pending Judicial Review" were served by hand delivery or by facsimile and overnight delivery (where indicated), to the following:

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